**The International Court of Justice Advisory Opinion on the Barrier:**

**A Critique Within a Historical and Political Context**

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**I. Introduction**

Ever since the International Court of Justice (ICJ) rendered its Advisory Opinion in July 2004 [[2]](#footnote-2) on the legality of Israel’s construction of the Terrorist Security Barrier (TSB) or the ‘Wall’[[3]](#footnote-3) as the ICJ refers to it, critics of Israel’s West Bank settlement policies have relied upon the Opinion in support of their position that political and economic pressure in the form of BDS (boycott, divestment and sanctions) should be brought to bear on Israel generally and on her West Bank settlement.

Few of her critics have examined the Opinion in any depth to determine whether the Court’s conclusions are well founded in law[[4]](#footnote-4) and what its consequences are likely to be on future negotiations between Israel and the Palestinians.[[5]](#footnote-5) For her part, Israel has refused to submit to ICJ adjudication without her consent, arguing that the issues lying between her and the Palestinians are contentious and are to be resolved solely by negotiation in accordance with the Oslo Accords. However, the very fact that the Palestinians, supported by the Arab block, initiated such a reference to the ICJ rather than continue negotiations with Israel on Final Status Issues, indicates their intention to achieve their objectives by means other than negotiation.[[6]](#footnote-6)

Since the opinion being requested by the General Assembly was an advisory one and not dispositive of the issues between Israel and the Palestinians, the ICJ ruling should be viewed as political rather than as legally binding on Israel and the PLO. Until now all resolutions passed against Israel in respect of the West Bank settlements and Jerusalem have been passed within the framework of Chapter VI of the UN Charter. As such, these all take the form of recommendations and are not binding.[[7]](#footnote-7) Notwithstanding the defects in the Opinion set out below, in finding that the TSB constitutes a “threat to international peace” the Court has opening the way for the UNGA to pass a resolution recommending that UNSC take mandatory action against Israel under Chapter VII of the UN Charter directed at legitimising, at least initially, compulsory international political and economic sanctions against Israel.[[8]](#footnote-8)

Such action would provide yet a further stumbling block to negotiations between Israel and the Palestinians and advancing the latters’ objective in achieving their goals politically contrary to their agreement as expressed in the Oslo Accords and would discourage parties from fulfilling their previous commitments.

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This paper attempts to provide a point of departure different from the many academic papers which have been critical of the ICJ opinion, and supplements an earlier paper submitted to the UK House of Commons Select Committee on International Development regarding legality of Israel’s activities in the Territories in addition to the construction of the Fence.[[9]](#footnote-9) The object of this paper is to demonstrate that Israel has a creditable claim of right to settle her population in the West Bank not based on belligerent occupation but by virtue of Article 80 of the UN Charter combined with the Palestine Mandate, Article 6.

**II. Historical and Political Context for Israel’s Security Fence Construction**

1. **Pre 1967 - 1993**

In April 1947,[[10]](#footnote-10) Britain decided to relieve herself of the responsibilities she had assumed under the Palestine Mandate of 1922 following the conclusion of World War I. She referred the ‘Palestine Question’ to the United Nations General Assembly which, after studying a Special Committee Report on the matter,[[11]](#footnote-11) recommended the partition of Palestine into a Jewish and an Arab state;[[12]](#footnote-12) a recommendation which the Arabs member states of the United Nations rejected. Immediately following the withdrawal of British troops on May 14, 1948, the Jewish population of Palestine declared themselves as the independent Jewish State of Israel.[[13]](#footnote-13) For their part, the Arabs in Palestinian failed to declare their State. Instead the neighbouring Arab States immediately invaded the Jewish designated territory in an attempt to eliminate the nascent state. Although Israel succeeded in repelling the Arab invasion, Jordan managed to retain control over Judea and Samaria, including the eastern part of Jerusalem (‘West Bank’).

Through UN mediation, a ceasefire between Israel and Jordan was agreed, expressed in the April 4, 1949 Israeli-Jordan Armistice Agreement.[[14]](#footnote-14) The demarcation lines drawn on the maps annexed to the Agreement did not constitute an agreed territorial border between Israel and Jordan;[[15]](#footnote-15) sovereignty over the West Bank territory remained in dispute, both sides reserving their rights in anticipation of negotiating a peace agreement.[[16]](#footnote-16) However, this failed to materialise and Jordan unilaterally annexed the West Bank in 1950; a move which failed to receive international recognition except from Britain and Pakistan.

In 1967, Israel came under imminent threat of attack by Egyptian, Syrian and later by Jordanian forces. In exercising her inherent right of self-defence under Article 51 of the UN Charter, she succeeded in overcoming her foes. In the process, she defeated the Jordanian forces and gained control and jurisdiction over the West Bank and its hostile Arab population.[[17]](#footnote-17)

Despite Israeli attempts thereafter to resolve her conflict with the Arabs by peaceful means, her initial approaches were rejected at the outset, as evidenced by the Khartoum ‘3 No’s’ resolution passed by the Arab League Heads of State in September 1967.[[18]](#footnote-18)

Notwithstanding attempts in the General Assembly and the Security Council to brand Israel as the aggressor and to force her to retreat back to the 1948 armistice lines the Security Council, after extensive negotiations led by Britain, unanimously passed Resolution 242[[19]](#footnote-19) which required both

1. the withdrawal of Israeli troops “***from territories*** occupied in the recent conflict” and
2. termination of all claims or states of belligerency and respect for and acknowledgement of the sovereignty, territorial integrity and political independence of every State in the area and their right to live in peace *within secure and recognized boundaries* free from threats or acts of force.(Author’s emphasis)

Although the Resolution was accepted by both Israel and the Arabs, it failed to prevent Egypt’s ‘War of Attrition’ (1969-70)[[20]](#footnote-20) and the 1973 Yom Kippur War[[21]](#footnote-21) instigated against Israel by Egypt, Syria and Jordan. The Arab defeat in this last conflict, followed by UNSC Resolution 338[[22]](#footnote-22) coupled by intense political pressure exerted by US Secretary of State Henry Kissinger,[[23]](#footnote-23) ultimately succeeded in bringing Israel and Egypt together in 1978 at Camp David, and enabled Menachem Begin of Israel to negotiate and conclude a peace treaty with Anwar Sadat of Egypt on March 26, 1979[[24]](#footnote-24).

1. **1993 Oslo – 2000**

Israeli- Palestinian negotiations were unofficially and secretly initiated by discussions held between Israeli academics and PLO senior representatives through the good offices of the Norwegian Ministry of foreign Affairs.[[25]](#footnote-25) Following the official adoption by the Israeli Ministry of Foreign Affairs of these negotiations[[26]](#footnote-26) supported by with United States, Israel and the PLO concluded Declaration of Principles in 1993 (DoP or “Oslo I”).[[27]](#footnote-27)

Three crucial letters[[28]](#footnote-28) provided the substructure for the DoP and the implementing interim agreements. Chairman Arafat’s letter to Premier Rabin committed the PLO (a) to recognize the right of the State of Israel to exist in peace and security; (b) to accept UNSC Resolutions 242 and 338; and most importantly (c) to a peaceful resolution of the conflict between the two sides declaring *inter alia*:

“that all outstanding issues relating to permanent status will be *resolved through negotiations..*.*the PLO renounces the use of terrorism and other acts of violence and will assume responsibility over all PLO elements and personnel in order to assure their compliance, prevent violations and discipline violators*...” (Author’s emphasis)

Norway’s Foreign Minister received a much shorter letter from Arafat in which the latter confirmed that the PLO calls upon the Palestinian people in the West Bank and Gaza Strip to take part in the steps leading to the normalization of life, “rejecting violence and terrorism…”

The third letter - Premier Rabin’s response to Arafat confirmed that:

“*in light of the PLO commitments included in your letter,* the Government of Israel has decided to recognize the PLO as the representative of the Palestinian people and *commence negotiations* *with the PLO* within the Middle East peace process.” (Author’s emphasis)

To implement the Accords, an 'interim' or 'transitional period' of 5 years was agreed upon in September 1995,[[29]](#footnote-29) during which time a very wide range of governmental functions were to be transferred to the Palestinians.[[30]](#footnote-30)   
  
After concluding two further preliminary agreements,[[31]](#footnote-31) the parties subsumed their respective rights, obligations and expectations under an Interim Agreement on Palestinian Self Government signed on September 28, 1995 together with seven annexes,[[32]](#footnote-32)which set forth thedetailed relations between Israel and the Palestinians. Their main object was to broaden the opportunities for Palestinian self-government and reduce points of friction between Israelis and Palestinians, and to enable cooperation and co-existence between Israelis and Palestinians based on common interest, dignity and mutual respect. At the same time the Interim Agreement was also intended to protects Israel's vital interests, particularly its security both externally as well as the personal security of its citizens in the West Bank.

For administrative purposes and to implement Oslo II, the West Bank territory has been and continues to be divided into three areas:[[33]](#footnote-33)

* Area A, includes the six major Palestinian cities and their surrounding areas. It covers approximately 18% of the West Bank, within which the Palestinian Authority exercises full civil control, including internal security. This area contains no Israeli settlements. Israeli citizens, including those holding dual nationality, are currently prohibited by Israeli law from entering Area A[[34]](#footnote-34)   
  The Israel Defence Forces maintain no presence there, but sometimes conducts incursions to quell violent riots directed at Israel[[35]](#footnote-35) and to arrest suspected militants.
* Area B covers approximately 25% of the West Bank and includes most of smaller Palestinian towns and villages and areas within which the Palestinians exercise full civil control and joint security control with Israel. The Area includes no Israeli settlements.
* Area C covers approximately 57% of the West Bank in which Israel has retained full civil and security control, except over Palestinian civilians. Area ‘C includes all Israeli settlement blocks[[36]](#footnote-36) and strategic security zones.

Of singular importance in Area ‘C’ is Israel’s continuing exercise of control over town planning and building construction regulation under which any official settlement activity is authorised. It is within this Area and under Oslo II that Israel has constructed the majority of the TSB and has allowed civilian settlements to be established.

1. **Final Status Issues**

Crucially, a number of major areas of concern: (i) Jerusalem, (ii) refugees, (iii) settlements, (iv) security arrangements, (v) borders,(vi) relations and cooperation with other neighbours, were excluded from both Oslo I and the interim arrangements and were left for subsequent negotiation in permanent status arrangements.[[37]](#footnote-37) The failure of the parties to reach agreement on these issues gave rise to Palestinian violence in Intifada II.

* 1. **2000-2014 Breakdown of Final Status Negotiations – al -Aqsa Intifada**

Negotiations over Final Status issues were to begin no later than May 1996, and conclude by the end of the interim period - May 1999. Notwithstanding several attempts by the respective Israeli and PLO negotiating teams to arrive at a settlement, final talks held at Camp David between Israeli Prime Minister Ehud Barak and Palestinian Authority Chairman Yasser Arafat in July 2000 collapsed, despite the active involvement of US President Clinton. The two sides were unable to agree upon the status and sovereignty over Jerusalem and Temple Mount, Israel’s security concerns, the Palestinian refugees’ "right of return," and territorial disputes. Additionally, Arafat refused to recognise Israel as the “Jewish State”

Following the breakdown of negotiations, the Arafat led PLO, made the decision to resort to violence in abrogation of the commitments made in 1993,[[38]](#footnote-38) and awaited an appropriate opportunity to act. Ariel Sharon (then the opposition leader of the Likud Party) obliged! On September 28, 2000 he visited the Temple Mount accompanied by a large police security presence, notwithstanding that he entered the area during normal visiting hours and only after receiving permission from the PA. He made no attempt whatsoever to enter the Al-Aqsa Mosque and his route completely avoided it and its precincts. In fact, prior to Sharon’s visit, there had been sporadic outbreaks of violence, led by Arafat’s Fatah movement, [[39]](#footnote-39) indicating that the extended riots which followed -Intifada II- were not spontaneous but pre-planned, as the Palestinians themselves later confirmed. [[40]](#footnote-40)

Intifada II was expressed not only by civil disturbances, throwing of stones and molotov cocktails, but most significantly by numerous suicide bomber attacks perpetrated on Israel’s civilian population.   
  
The first two years of the conflict claimed many victims. In 2001, 207 Israelis were killed, and in 2002 the number of fatalities rose to 452. On the eve of Passover, April 2002, the Hamas organization in Samaria perpetrated an attack on 250 civilian guests attending the Park Hotel in Netanya, resulting in 28 fatalities and another 165 injured.

The number and extent of the damage caused by these attacks has led the Israeli Supreme Court to describe the situation between Israel and the terrorists as one of **armed conflict short of war rather than a policing activity.**[[41]](#footnote-41) These attacks have compelled Israel to devise strategies which enable the IDF to combat terrorist activity effectively but at the same time also minimising, as far as possible, the killing of, and injury to innocent Palestinian civilians and their property.

* 1. **Military Incursions**

Following the Park Hotel massacre, Israel launched ‘Operation Defensive Shield’ which focused on the terrorist infrastructures in urban centres of Samaria[[42]](#footnote-42) and the search for terrorist hideouts and arms caches concealed in civilian areas. Palestinian militants deliberately secreted themselves and their arms among Palestinian civilians, contrary to the 4th Geneva Convention, resulting in the unintentional killing by the IDF of a number of civilians. Although IDF incursions resulted in a sharp decrease in the number of suicide attacks, nevertheless Israel came under severe international condemnation for responding disproportionately,[[43]](#footnote-43) especially in Jenin; condemnation which was shown subsequently to have been unjustified[[44]](#footnote-44)by the small number of fatalities and casualties among genuine civilians, the number of Palestinians identified as active militants (many of whom very disguised as civilians) and the relatively high number of IDF casualties.

* 1. **Targeted Killing**

In an effort to reduce the number of unintentional civilian fatalities and yet deterrent suicide bombing, Israel resorted to the targeted killings of militant terrorist leaders. This, too, has generally been condemned by western world opinion as political assassination. Despite international condemnation, the strategy became the subject of intense judicial scrutiny by the Israel Supreme Court.[[45]](#footnote-45) It concluded that where militant leadership was concerned, there was no protection to civilians “for such time as they take a direct part in hostilities."[[46]](#footnote-46) …

The examination of the "targeted killing" – and in our terms, the preventative strike causing the deaths of terrorists, and at times also of innocent civilians – has shown that the question of the legality of the preventative strike according to customary international law is complex (references omitted] The result of that examination is not that such strikes are always permissible or that they are always forbidden. The approach of customary international law applying to armed conflicts of an international nature is that civilians are protected from attacks by the army. However, that protection does not exist regarding those civilians "for such time as they take a direct part in hostilities" (§51(3) of The First Protocol). Harming such civilians, even if the result is death, is permitted, on the condition that there is no other less harmful means, and on the condition that innocent civilians nearby are not harmed. Harm to the latter must be proportionate. That proportionality is determined according to a values based test, intended to balance between the military advantage and the civilian damage. As we have seen, we cannot determine that a preventative strike is always legal, just as we cannot determine that it is always illegal. All depends upon the question whether the standards of customary international law regarding international armed conflict allow that preventative strike or not. .”[[47]](#footnote-47)

* 1. **Security Fence**

To reduce the continuing threat of suicide bombing, during April- June 2002, Israel decided upon a non-violent deterrent strategy – the construction of an obstacle consisting of ditch, an open and clear pathway upon which, for the most part, a wire fence would be constructed, including electronic sensors, which if penetrated would give IDF patrols sufficient time to take counter-measures.[[48]](#footnote-48) According to Israeli government statistics, between 2000 and July 2003, when the "first continuous segment" of the barrier was being built, 73 Palestinian suicide bombings were carried out from the West Bank, killing 293 Israelis and injuring over 1,900. However, from August 2003 to the end of 2006, only 12 attacks were carried out, killing 64 Israelis and wounding 445. Supporters of the barrier argue that this indicates its effectiveness in preventing such attacks.[[49]](#footnote-49)

Apart from the expense, the major problem confronting Israel was to find a route which would satisfy her defensive interests while minimising the social, economic harm to the Palestinian population and limiting the need to requisition privately owned land located over the 1949 ’Green’ Armistice Line. Israeli defence interests could not be accommodated along that Line for two reasons.

First, it was militarily indefensible, located for the most part on low lying land overlooked by higher ranges of barren hills. Furthermore, Israel’s acceptance of the green line would have signalled to her enemies that violence is legitimate means to resolve international conflict notwithstanding that the Palestinians gave undertakings in the Oslo Accords to resolve their differences by negotiation and forswearing a resort to violence  
  
Second, from a political perspective, the construction of a fence along the Line would be interpreted by the Palestinians in particular, and by the world at large, as Israel’s acceptance of the Line as the international boundary between her and the Palestinians; a position which not only ran counter to UNSC Resolution 242, but would have deprived her of rights of access to Jewish holy sites, especially in Jerusalem, which Jordan had previously denied.  
  
A further problem in setting the route of the security barrier was the presence of Israeli civilian settlements constructed over the Green Line. If the objective of the barrier was to protect the settlements as well as the rest of Israel’s citizens, then their inclusion could be interpreted by the Palestinians as an Israeli step towards annexing the land between the Green Line and the Fence and thereby reducing the amount of territory to be included in any future Palestinian state and its viability. Notwithstanding an Israeli declarations that the barrier is temporary and can be removed once the terrorist threat is removed, from the Palestinians’ perspective, they view the construction of the Israeli settlements as illegal in international law, and Israel’s attempt to maintain or even enhance its security is disproportionate to the damage the fence causes to civilians in terms of loss of free access to and utilisation of private and public land, reduces access to health, educational and other public services and causes general inconvenience to the Palestinian population at large.

Unfortunately, Israel’s having to resort to the erection of the TSB as a means of preventing terrorist incursions has provided the Arab Block with the pretext of pushing the General Assembly to invite International Court of Justice to express its views, in an advisory opinion, not only on the legality of the security fence but also the legality of Israel’s settlements including the construction in Jerusalem and the application of Israeli law there. This has undermined the whole raison d’etre of UN Security Council Resolution 242 and 338 and has enabled the Palestinians to avoid complying with their undertakings towards Israel to settle their differences by negotiation.

**III General Assembly Undermines Israel–Palestinian Negotiation Process**

The genesis of the Arab block’s attack on Israel’s occupation of the West Bank started with its invocation of UNGA Uniting for Peace Resolution, 377A(V). [[50]](#footnote-50) This was first adopted in 1950 at the height of the Cold War between the USA and the USSR. It purports to allow the General Assembly to be convened where the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security in any case where there appears to be a threat to the peace, breach of the peace, or act of aggression. Where the General assembly is not in regular session, it can be convened within 24 hours in a Special Emergency Session.[[51]](#footnote-51)

The Middle East situation has been the subject of six out of ten such General Assembly Emergency Special Sessions. The first three were convened by the Security Council in November 1956, (Suez); August 1958 (America’s involvement in Lebanon), June 1967 (Six Days War).

The last emergency session, the 10th, was called on 22 April 1997at the behest Qatar on behalf of the Arab Block, who contended in ES-10/1 that a dangerous situation had arisen such as to constitute a threat to international peace and security resulting (i) from Israel’s illegal construction of the Jabal Abu Ghneim [Har Homa] settlement to the south of occupied East Jerusalem, and other measures regarding Jerusalem and the building of settlements and (ii) the Security Council’s inability to pass a resolution condemning Israel owing to the use of the veto by a permanent member of the Council on two successive occasions in less than two weeks. Qatar alleged that Security Council’s failure to exercise its primary responsibility under the UN Charter entitled the General Assembly to convene an emergency special session under the UNGA ‘Uniting for Peace’ Resolution 377A(V).

Significantly the 10th Special Emergency Session has never been closed, but adjourned and ‘rolled over’ remaining open to deal with the next Arab complaint against Israel without considering whether circumstances justified invoking UNGA 377A and regardless of whether the Security Council has been unable to act due to the veto by a permanent member. Since the adjournment of the first and second sittings of the 10th Emergency Session in 1997, the General Assembly has been recalled on numerous occasions and passed some 18 resolutions despite the fact that the Security Council has remained seized of the matter and has passed appropriate resolutions.[[52]](#footnote-52)  
  
During the first two sittings, the Assembly passed Resolutions A/RES-/ES-10/2 and 10/3[[53]](#footnote-53) which (i) condemned the Har Homa construction and Israel’s *settlement policies in the Territories as illegal*; (ii) reaffirmed that her legislative and administrative measures and actions that have altered or purported to alter the character, *legal status and demographic composition of Jerusalem to be null and void* and of no validity whatsoever; (iii) demanded that Israel accept the *de jure* applicability of the 4th Geneva Convention to all the territories occupied since 1967; (iv) recommended that the High Contracting Parties to the 4th Geneva Convention take measures to ensure that Israel respect the Convention.

Resolution ES-10/4 passed November 13, 1997[[54]](#footnote-54) again related to Har Homa but was expanded to demand that Israel: (i) apply de jure the 4th Geneva Convention relative to the West Bank; (ii) cease and reverse *all actions taken illegally against Palestinian Jerusalemites*; (iii) make available to Member States the necessary information about goods produced or manufactured in the illegal settlements in the Occupied Palestinian Territory, including Jerusalem.

Resolutions ES-10/5, /6 and /9 reiterated Israel’s non- compliance with the earlier resolutions and set out the procedural and other steps to be taken to have the 4th Geneva Convention made applicable in the Territories.[[55]](#footnote-55)  
  
Readers should bear in mind that between mid-December 1999 and July 2000, Palestinian and Israeli negotiating teams had met to discuss the Final Status issues which they failed to resolve. The outbreak of violence - termed the ‘al-Aqsa Intifada’ or ‘Intifada II’ - which followed, diverted the Assembly’s immediate focus of attention from Israel’s construction of alleged illegal settlements to Israel’s military response to the attacks. Although UNGA Resolution A/RES/ ES - 10/7 passed in October 2000 condemned Israel for the outbreak of the al-Aqsa Intifada and for her use of excessive force to quell it,[[56]](#footnote-56) the Assembly continued to reiterate that Israeli settlements in the Occupied Palestinian Territory, including Jerusalem, were illegal and an obstacle to peace. The next resolution, A/RES/ES10/8[[57]](#footnote-57) passed in this rolling 10th Special Emergency Session on December 20, 2001 concentrated upon the continuing violence, condemning all acts of terror, in particular those targeting civilians but also what it termed [Israel’s]‘extrajudiciary’ executions, excessive use of force and wide destruction of properties.

At this point, it is important to recall that Palestinian suicide bombers continued to attack Israeli civilians, culminating in the Park Hotel massacre in Netanya during the Passover Festival on March 27, 2002 – an event which forced Israel to take harsh military measures (Operation Defensive Shield) and at the same time to implement with greater alacrity the construction of a terrorist security barrier - a concept that had been conceived some years earlier – which would separate most of the West Bank from areas inside of Israel.

Meanwhile the General Assembly continued its 10th Emergency Session and adopted Resolutions A/RES/ES10/10[[58]](#footnote-58) on 7 May 2002, and A/RES/ES/11[[59]](#footnote-59) on 5 August, 2002, respectively. They make no mention of the suicide bomber attack on the Passover guests at the Park Hotel in Netanya but expresses concern at the reports of breaches humanitarian law purportedly committed in the Jenin refugee camp in the course of Operation Defensive Shield and other Palestinian cities by the IDF and the lack of access to food, water and medicines, owing to the Israeli siege and the attacks on Palestinian cities.

October, 2003 saw the General Assembly reconvened yet again in Emergency Session, and express its concern in ES-10/13[[60]](#footnote-60) that the route marked out for Israel’s construction of the ‘wall’ in the Occupied Palestinian Territory, including in and around East Jerusalem, [which] could prejudge future negotiations and make the two-State solution physically impossible to implement and would cause further humanitarian hardship to the Palestinians. The Assembly demanded in Resolution A/ES-10/13 that Israel “stop and reverse the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem, which is in departure of the Armistice Line of 1949…”  
  
By December 2003, however, Israel experienced yet more Palestinian suicide bombings, leading to the General Assembly to demand, in Resolution A/RES/ES/10/12,[[61]](#footnote-61) that the parties comply with the Road Map proposed by the Quartet. For the first time, the Assembly condemned the suicide bombings, their recent intensification, and the obligations imposed on the Palestinians in Road Map to take all necessary measures to end violence and terror. Nevertheless, the Assembly also took the opportunity to deplore Israel’s ‘extrajudicial killings’ and their recent escalation as violations of international law.

Notwithstanding the General Assembly resolutions, Israel continued the construction of her security fence, impelling the Palestinians in December, 2003 to change their tactics. At the initiation of a member of the Arab Block, the General Assembly was persuaded to adopt Resolution A/RES/10-14 which moved the search for a resolution of the Israeli-Palestinian conflict from one of negotiation to one of unilateral political action within the judicial arena, in the form of a request for an Advisory Opinion from the International court of Justice.

In light of the above situation it is little wonder that Israel refused to submit to the jurisdiction of the ICJ in a contentious dispute she has with the Palestinian non-state entity. The ICJ’s assumption of jurisdiction in response to a UNGA 377 ‘Uniting for Peace’ resolution, replaces the sovereign equality of States in the UN by the tyranny of the majority in circumstances where concerted action was not deadlocked by division in the Security Council.

**IV General Assembly Terms of Reference to International Court of Justice**

The General Assembly’s question addressed to ICJ upon which its advisory opinion was sought is expressed in Resolution ES10/14 as follows:

“What are the legal consequences arising from the construction of the wall being built by Israel, the occupying Power, in the Occupied Palestinian Territory, including in and around East Jerusalem, as described in the report of the Secretary-General, considering the rules and principles of international law, including the Fourth Geneva Convention of 1949, and relevant Security Council and General Assembly resolutions?”

The operative paragraph of the Resolution is preceded by some twenty Recitals which in effect constitute the terms of reference for the Court and demonstrate an inherent bias contained in the question presented to the Court for its independent opinion and assumptions of Israel’s illegal action which the Court is invited to adopt without independent examination.

Of these:

* Recital 5 recalls the Palestine Partition Resolution 181 (11) of 29 November 1947;
* Recital 7 recalls 13 specific Security Council and General Assembly resolutions to which the ICJ’s attention is especially drawn;
* Recital 9 recalls the 1907 Hague Regulations Respecting the Laws and Customs of War on Land;
* Recitals 8, 10, and 11 reaffirm the applicability of the Fourth Geneva Convention, “welcome the convening of the International Congress to enforce the Convention and its Protocol in the Occupied Palestinian Territory, including East Jerusalem and express the General Assembly’s support for Congress’ declaration of 5 December 2001 in which the application of the Convention in the Territories was confirmed.”
* **Recital 12 recalls the UN Resolutions affirming the illegality of the Israeli settlements in the Territories, including East Jerusalem, and which are an obstacle to peace**;
* **Recital 13 recalls the UN Resolutions affirming Israel’s action to change the status and demographic composition of Occupied East Jerusalem has no legal validity and is nuIl and void**.
* Recital 14 merely ‘notes’ the Oslo Accords agreed between Israel and the PLO.
* Recitals 15 and 16 express the Assembly’s grave concern over

“the commencement and continuation of construction by Israel of a wall in the Occupied Palestinian Territory, including in and around East Jerusalem, which is in departure from the Armistice Line of 1949 (Green Line) and which has involved the confiscation and destruction of Palestinian land and resources, the disruption of the lives of thousands of protected civilians and the de facto annexation of large areas of territory, and underlining the unanimous opposition by the international community to the construction of that wall; and

the devastating impact of the projected parts of the wall on the Palestinian civilian population and on the prospects for solving the Palestinian-Israeli conflict and establishing peace in the region.

* Recitals 17 and 19 welcome the 8 September 2003 report of the Human Rights Special Rapporteur on the human rights situation in the Palestinian territories since 1967, in particular the section regarding the wall and the Secretary-General’s Report submitted in accordance with resolution ES-10/11; and finally
* Recital 18 affirms the necessity of ending the conflict on the basis of the two-State solution of Israel and Palestine living side by side in peace and security based on the Armistice Line of 1949, in accordance with relevant Security Council and General Assembly resolutions.

No mention whatsoever is made in the Recitals to the numerous Palestinian suicide bomber attacks made on civilians residing in Israel which commenced following the breakdown of final status negotiations in 2000; attacks which compelled Israel to resort to a number of strategies to prevent such attacks, including: selective deportations of militants from the West Bank, limited IDF military incursions into Palestinian controlled territory and targeted killing of terrorist militant leadership, all of which have been condemned internationally as disproportional responses. Ironically, it has been Israel’s non-lethal and non-violent response to suicide bomber attacks – the construction of the security fence - which has generated the greatest international condemnation but has, nevertheless, proved to be the most effective means of protecting Israeli civilians, taking into account in the balancing process,

the damage and inconvenience caused to the Palestinians.

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**V. ICJ’s Reasoning Underlying its Advisory Opinion**

For the convenience of Readers unable to access the full Court’s full report,[[62]](#footnote-62) the following propositions summarise what appear to the Author to be the main line of the reasoning underlying the ICJ’s Advisory Opinion regarding the legality of the TSB. Although throughout the vast majority of its route, the TSB is constituted by an electronic fence[[63]](#footnote-63) and the UN Secretary General referred to it as "a barrier," the Court decided, nevertheless, to adopt the nomenclature used by the UN General Assembly and designate it as a "wall".

***Application of Geneva IV to the West Bank***

1. The Israel-Jordanian Armistice Agreement declares that the forces of either party shall not go beyond the 1949 Armistice lines.
2. Both Israel and Jordan were parties to Geneva IV before 1967, when the West Bank was under Jordanian jurisdiction and control.
3. Therefore after Jordan’s defeat in 1967 Six Days War when Israel asserted effective military control of over the captured West Bank territory, the West Bank became subject to the provisions of Geneva IV and continues to do so as long as the occupation continues.
4. The subsequent Jordanian renouncement of sovereignty and the "Oslo" agreements with the PLO have not changed this legal situation.

***Inapplicability of the Inherent Rights of Self Defence under UN Charter Article 51***

1. Article 51 of the UN Charter is irrelevant.
2. The building of a ‘wall’ by Israel to prevent terrorist attacks on her civilian population does not fall within the ambit of Article 51 as a legitimate exercise of Israel’s inherent right of self- defence against armed attack.
3. Resort to military action under Article 51 is justified only
   1. if an armed attack occurs perpetrated by a State rather than by a non-state entity;
   2. the attack originates from territory lying outside the jurisdiction of the defending power or territory occupied by it (i.e. under its control);

neither of which apply in the present circumstances

1. The UN Security Council Resolution permitting self defence against terrorist attacks, adopted after 9/11, is not relevant to the situation because in this case the attacks emanated from territory under Israel occupation.
2. Israel as the occupying power can only take actions permitted by Geneva IV such as detention. It cannot take any other steps such as acts of self-defence
3. If territory is occupied by a power other than its legitimate sovereign, then one year after the general close of military operations, a number of enumerated provisions of Geneva IV, continue to apply, including Articles 64 and 49(6)

***Application of Police Power to Maintain the Peace - Not the Law of Armed Conflict***

1. Geneva IV, Article 64 (which is derived from Hague Regulations, Article 45) obliges the Occupying Power, to ensure, as far as possible, ‘public order and safety’, while respecting, unless absolutely prevented, both the civil and criminal laws of the territory in force immediately prior to the occupation.
2. Such public order is be maintained by the Occupying Power through its exercise of the police power in accordance with the normal criminal procedural and substantive law in effect in the occupied territory immediately prior to the occupation and also (by way of extension) in accordance with the Occupying Power’s own human rights legislation.

*The* ***Legality of Israel Settlements***

1. Geneva IV Article 49(6), declares that the Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies. Therefore Israeli civilian settlements established over the Green Line on occupied territory previously held by Jordan are illegal, as determined and declared in UN Security Council and General Assembly Resolutions.

***Harm to Palestinians***

1. Article 53 of Geneva IV prohibits the Occupying Power from destroying State or private real [*i.e.* land] or personal property, except where such destruction is rendered absolutely necessary by military operations. The Court was not convinced that the destruction to property resulting from the wall’s construction fell within the exception.
2. Furthermore, the construction of the wall beyond the Green Line creates impediments to trade, economic, social and cultural development and restricts Palestinian freedom of movement- all contrary to the human rights treaties to which Israel is party.
3. The treaties apply not just within Israel but also extend to the occupied territory under her control.

***Israel’s Motivation in Erecting the Wall***

1. The route of the wall encroaches beyond the 1949 Green Line and places the illegal Israeli settlement blocks on the Israeli side. It may therefore be inferred, that Israel’s real motivation in constructing the wall is not to prevent terrorist incursions into her territory but to annex the occupied land lying between the Green Line and the Wall. Although Israel has given assurances that the "wall' is temporary the "wall" creates a fait accompli "that could become permanent".

***Conclusion***

1. The Wall is, therefore, illegal as are Israeli settlements.

**VI. Critique of the ICJ Opinion and its Conclusions**

The Author of this paper respectfully begs to differ with the reasoning and conclusions of the ICJ’s Advisory opinion. His comments will limited to a small number points since many other commentators[[64]](#footnote-64)have expressed their views extensively on such issues as (i) justiciability and judicial propriety in adjudicating a controversial issue without the consent of one of the parties, (ii) the Court’s determination as irrelevant, Israel’s resort to Article 51 of the UN Charter to defend itself against armed attack; (iii) the application of human rights law beyond a State’s territorial jurisdiction (iv) the inability of the ICJ to exercise a power of judicial review over the scope and legality of the decisions of the General Assembly in general and more particularly (v) the Arab block’s continuous resort to the UNGA Uniting for Peace Resolution, 377A(V), in circumstances where the Security Council is still seized of the subject matter and is not deadlocked by the veto of a permanent member.

In the Author’s view the Opinion fails to give due consideration to Israel’s real motivation in the constructing the TSB- i.e. the nature and extent of the injury to Israel’s population arising from Palestinian terrorism. In rejecting Israel’s claim that the TSB was erected in response to being the subject of terrorist motivated armed conflict, the Court avoids the day to day reality which the Israeli Supreme Court does confront in applying the concept of proportionality arising from armed conflict; namely,[[65]](#footnote-65) the anticipated military advantage to be derived from the construction of the fence weight against the unintended harm likely to be caused to innocent civilians.[[66]](#footnote-66) The Court also ignores

Israel’s rights to regulate and control land use and building construction in Area ‘C’ under Oslo II to which the Palestinian Authority voluntarily acceded.

Finally, in the Author’s considered opinion, the Court’s review of the historical context within which the Arab –Israeli conflict has developed is biased and very selective in its choice of facts and law. In this regard Court’s failure to consider Article 80 of the UN Charter, drawing in its wake the application of the provisions of the Palestine Mandate to the territory upon which the majority of the ‘Wall’ has been erected[[67]](#footnote-67) constitutes a fundamental defect in the Court’s conclusions. This topic is dealt with in Section 3 below.

1. **Israel’s Right of Self Defence under Article 51 of the UN Charter**

The Court dismisses Article 51 as “irrelevant” without any explanation, but holds that it can be invoked when a State is attacked by another State - and in the aftermath of the terrorist attack on New York’s Twin Towers on 9/11- in response to an armed attack by a non-state entity originating outside the control of the State being attacked.[[68]](#footnote-68) Why the Court concluded that Israel could not defend itself against the Intifada II suicide attacks is puzzling because the language of Article 51 demands no such constraint.[[69]](#footnote-69)   
  
The Court’s underlying logic *might* be explained as follows, but in the Author’s opinion is unpersuasive:   
  
Article 51 arises only in the initiation of the armed conflict (*jus ad bellum*) where the justification for resorting to force to defend against an armed attack reaches a certain threshold; such as a threshold set out in Article 2(4) of the UN Charter – where a member state fails to refrain in its international relations from the threat or use of force against the territorial integrity or political independence of another state, or in any other manner inconsistent with the purposes of the United Nations.[[70]](#footnote-70) Since (i) the Palestinians do not constitute a State, (ii) the Intifada II attacks arose after the initial attack which entitled Israel to act initially in self-defence, (iii) the West Bank is under Israeli occupation and control, therefore Article 51 is inapplicable; (iv) Israel’s duty while the territory is under her control is to ensure that law and order is maintained through the exercise of her civilian policing powers – and not those of her military.

However, the text of Article 51 neither confines the right of a defending state to defend itself only if attacked by another state, nor is its application limited to a *jus ad bellum* situation. There is no logical reason why the right of self-defence may not be asserted as a continuing one which may be resorted to, not only in response to an initial resort to force, but also during a period of insurrection by a militant organisation or group engaged in an armed conflict short of war which arises during an extended occupation notwithstanding that ‘a general close of hostilities’ may be said to have emerged with the signing of Oslo I and II.

Geneva IV Article 6 (2),[[71]](#footnote-71)provides that if territory is occupied then one year after the *general close of military operations*, certain enumerated provisions of Geneva IV continue to apply so long as the occupation continues. These include Article 64(1) [[72]](#footnote-72) which echoes Article 43 of the 1907 Hague Regulations.[[73]](#footnote-73)

These provisions oblige the Occupying Power to restore, ensure, and maintain, as far as possible, 'public order and safety', through the exercise of the police power in accordance with the normal criminal procedural and substantive law in effect in the occupied territory immediately prior to the occupation and also by way of extension, in the ICJ’s opinion, in accordance with the Occupying Power's own human rights legislation.

Even so, this does not prohibit the Occupying Power from acting in self-defence and subjecting the population of the territory to provisions which are essential to enable the Occupying Power to fulfil its obligations.[[74]](#footnote-74) In principle, this provision provides a foundation for Israel’s justification in erecting the security fence on land beyond the ‘Green Line’, particularly where without such measure, full scale military operations would have to be reopened. In its implementation, however, the exact location of the fence would have to meet the tests of proportionality between the harm to the Palestinians and the injury to Israeli civil society.

In peremptorily dismissing Israel’s right to act in self-defence, the Court failed to consider that under Oslo II, it is the Palestinian Authority, and not Israel, which has jurisdiction over internal security and policing in Area ‘A’ from whence the suicide bombing originated. Since Israel does not exercise the general functions of government in Area ‘A’ and specifically not the power of internal security,[[75]](#footnote-75) and is incapable of so doing without resort to a full scale military operation, it is arguable therefore, that she is not in ***effective*** ‘occupation’ in Area ‘A’, and therefore she may resort to acting in self-defence against armed attacks by suicide bombers in accordance with the laws of war.

1. **ICJ Acceptance of the Validity of the General Assembly and Security Council Determinations that Israel’s Action is Illegal**

The Court appears accept as legitimate and not subject to its judicial review, the General Assembly’s practice of:

* resorting to the UNGA Uniting for Peace Resolution, 377A(V) in circumstances where the Security Council is still seized of the subject matter and is not deadlocked by the veto of a permanent member;
* remaining constantly in ‘Emergency Session’; and
* conducting the Emergency Session as rolling and open debate on any matter dealing with each and every event arising in the Israel-Palestine conflict as an emergency matter.

The Arab block’s practice of resorting to the Uniting for Peace Resolution in order circumvent Security Council resolutions which fails to satisfy their expectations, has now been extended to the passing of a resolution requesting the ICJ to render its Advisory Opinion in a non-emergency situation **not** in respect of whether Israel has acted illegally, but what action should be taken against her on the assumption that she has so acted.   
  
In deciding to respond affirmatively to the Uniting for Peace resolution requesting its Advisory Opinion, the Court has undermined the Security Council’s efforts to persuade Israel and the Palestinians to settle their differences by negotiation and enabled the Palestinians to evade their responsibilities undertaken in the Oslo Accords and act unilaterally.

Additionally, the Court’s acceptance of the Arab’s continuing resort to the Uniting for Peace resolution in non-emergency situations has created ambiguity in the distribution and balance of power between the Security Council and the General Assembly. The Court concluded that although the Security Council has prime responsibility for taking action in matters constituting a threat to international peace and security, the General Assembly also has power although probably not as co-extensive as that of the Council. This conclusion can only confuse international leaders as to the locus of power in the appropriate circumstances and encourage ‘forum’ shopping if a State is faced with having to comply with a resolution prejudicial to its interests.

Readers should be aware, that as Professor Kenneth Roberts[[76]](#footnote-76) and others have commented,[[77]](#footnote-77) the ICJ has no powers of judicial review over the decisions and actions by the other organs of the United Nations and neither does it determine whether an Organ has acted *ultra vires.* Furthermore, it should be noted that the ICJ, in rendering its Advisory Opinion, has made no independent examination regarding as to the validity of General Assembly and Security Council determinations that Israel has acted illegally in extending the application of Israeli law to East Jerusalem and to the settlement construction in the West Bank.

The Court therefore was presented with four options: It could have:

1. made its own factual determination- but was unable to because it does not have a trial chamber and Israel refused to submit the issue to its jurisdiction;
2. made its own determination as to the legality of Israel’s actions- but this would have meant its exceeding the terms of reference set for it by the General Assembly;
3. determined the issue was controversial and inappropriate for an Advisory Opinion – which it was invited so to do but rejected the offer; or
4. accepted as a given without examination, the validity of the Security Council and General Assembly findings and determinations as expressed in their respective resolutions, that Israel’s actions were illegal and proceeded forward on that assumption.

In choosing to pursue option (iv), it appears to the Author, that ICJ has demeaned the integrity of the International Court of Justice as the highest international judicial institution committed to the rule of law, and has become yet another international institution pursuing its own political agenda.[[78]](#footnote-78) In its advisory opinion on the legality of the ‘Wall’ the ICJ has exchanged roles with the Security Council. The latter’s position in the UN organisation is an executive one- but in this case it has, together with the General Assembly, purported to make a judicial determination. The ICJ has done the reverse: in its conclusions it has displayed an executive function in directing the steps which the General Assembly and Security Council should undertake rather than fulfilling its judicial functions.[[79]](#footnote-79)

**3. Status of the ‘Occupied’ West Bank Territory’**

In the Author’s view, the most crucial omission in the ICJ’s historical analysis was its failure to consider the continuing effect of the Palestine Mandate on the territorial area over which sovereignty has been contested and in dispute.

In paragraphs 70-77, the Court deals with the status of the territory. This section is crucial because the conclusion of the Advisory Opinion is premised upon the Court’s finding that Israel’s presence in the territory is as a belligerent occupier under LOAC who has illegally transferred her population to occupied territory contrary to Article 49 (6) of the Geneva Convention. Having so found, this provides the foundation for the Court’s determination that Israel’s settlements and the construction of the Wall are illegal and places the present conflict within a purely Palestinian perspective and delegitimizes Israel.

Therefore, in order to determine whether Israel has a right to be present in territory lying beyond the Green Line and to build its security fence there, it becomes necessary to examine the status of the West Bank Territory before 1948. The ICJ avoided this task. In paragraph 70 of its Opinion, it described very briefly the origin of the Palestine Mandate and its purpose and then jumped immediately to paragraph 71 in which it referred to Britain’s declaration of intent to evacuate Palestine by August 1, 1948, her subsequent withdrawal on May 15, 1948 and the passage of UNGA Resolution 181 (II) on 29 November 1947 in the interim.

In the Author’s view this section of the Advisory Opinion amounts to a rewriting of history. In order to justify its conclusion, the Court has presented a selectively truncated summary of the historical political trends which occurred in Palestine following the dissolution of the Ottoman Empire and the objectives of the new international legal instrument - the ‘Mandate’ - which was created at that time. In so doing the ICJ failed to examine the express purpose of the Palestine Mandate which differed from the other mandates approved by the League of nations  
  
In paragraph 70, the Court looks to the League of Nations Covenant Article 22 [[80]](#footnote-80) and to the ICJ 1950 precedent in the *South West African Mandate* case[[81]](#footnote-81) for support for the proposition that the objective of Mandates generally was to advance the welfare and independence of indigenous people of the conquered territory. This proposition was developed during the 1919 Versailles Paris Peace negotiations following W.W. I. United States President Wilson, a strong anti- colonialist, was at pains to prevent France and Britain claiming their traditional rights as victors, to annex territory captured from the Central Powers and expanding their colonial hegemony. The compromise was found by Gen. Jan Smuts in the establishment of a Mandatory Government, created in accordance with Article 22 of the League of Nations Covenant. Such government was to be empowered to exercise all its powers in trust for the purposes set out in the Mandate instrument.[[82]](#footnote-82) This new international instrument of government gave rise to extensive academic comment as to the locus of sovereignty over the territory while under Mandate. Academics and others proposed a variety of solutions,[[83]](#footnote-83) but the most logical one, consistent with the mandatory-trustee concept was that in which sovereignty would be held in abeyance until the objectives of the Mandate were achieved and the Mandate terminated.[[84]](#footnote-84)

The terms of the various mandates were neither uniform nor did they have the same objectives. Article 22(3) of the League of Nations Covenant states unequivocally that the character of the various mandates must differ according to the stage of the development of the people, the geographical situation of the territory, its economic conditions and other similar circumstances.   
  
In its historical review, the Court completely ignored this differentiation. It accepted Syria and Iraq (Mesopotamia) to be Class ‘A’ mandates where the territory, its population and government appeared to have reached a stage of political maturity to be accepted as emerging states subject to receiving tutelage and guidance.[[85]](#footnote-85) Although Palestine is also categorised, by the Court as a Class ‘A’ Mandate, it relied on its earlier precedent in the South West Africa Mandate Advisory Opinion for the proposition that the objective of the Mandates generally was the advancement self-determination of the indigenous population unable to govern themselves.[[86]](#footnote-86)

"The Mandate was created in the interest of the inhabitants of the territory, and of humanity in general, as an international institution with an international object - a sacred trust of civilization." (1. C. J. Reports 1950, p. 132.) The Court also held in this regard that "two principles

were considered to be of paramount importance: the principle of non-annexation and the principle that the well-being and development of. . .peoples [not yet able: to govern themselves] form[ed] 'a sacred trust of civilization'[[87]](#footnote-87)

“C” mandates were applied where the territories were sparsely populated, or of small size, or remote from civilization, or are geographically contiguous to the territory of the Mandatory. In such instances, the mandatory is authorized to administer the mandated territory as an 'integral portion of its territory' subject to conditions prescribed in the mandate.[[88]](#footnote-88)

“[Class ‘C’ mandates] were invented to protect the interests and safeguard the development of peoples of a lower stage of civilization inhabiting former [enemy] overseas possessions in Africa and in certain islands of the Pacific…..[and] appear to be in much the

same international position as the [Colonial] protectorates in Africa and the Pacific Islands…

***[T]he powers exercised in a (colonial) protectorate are in fact territorial but, emanation though it be from the sovereignty of the State assuming it, differs from the establishment of that sovereignty in the country over which it is assumed; there is no annexation by the State in question.” [[89]](#footnote-89)***

This was certainly not the situation in Palestine!

This point is completely ignored by the Court in paragraph 88 of its Opinion which, again after referring to its earlier South West Africa opinions, continues to hold that the ultimate objective of the mandates was the self-determination of the ‘peoples concerned.’

The purpose underlying the application of ‘C’ Mandate objectives and powers is clearly inappropriate for the Palestine Mandate. In the case of the ‘sacred trust’ created by the Palestine Mandate, the defined ‘peoples concerned’ were not the indigenous ‘native’ population, but the Jewish people who were to be ingathered from their dispersion. In concluding that the purpose of the Palestinian Mandate was to advance the interests of the indigenous population, Court created a faulty foundation for setting the stage for a Palestinian claim to a right of self-determination over the West Bank territory.   
  
Even a superficial examination of the text of the Palestine Mandate instrument and comparing it with that of South West Africa demonstrates their respective objectives to be totally different. The objective of the South West Africa Mandate was clearly for the protection of and advancement of the indigenous population.[[90]](#footnote-90) The paramount purpose of the Palestine Mandate was the re-establishment of a Jewish homeland in Palestine. This was to be achieved by the Mandatory government’s facilitation of Jewish immigration and close settlement on vacant public and waste land, but without prejudice to the ‘civil and religious rights of the non-Jewish communities.

The Author presents the following propositions as representing a more accurate analysis than that provided by the Court in that it takes into account the effect of Article 80 of the UN Charter which the Court failed to consider and which is very relevant to its conclusion.

1. Following the dissolution of the League of Nations in 1946, the UN Charter contemplated that Mandates created by virtue of the League of Nations Covenant, Article 22 would form the basis for Trusteeship Agreements to be concluded under Chapter XII of the Charter.
2. Until such agreements are concluded, if ever, Article 80 of the Charter provides *inter alia:*

… Except as may be agreed upon in individual trusteeship agreements, made under Articles 77, 79, and 81, placing each territory under the trusteeship system***, and until*** ***such agreements have been concluded***, nothing in this Chapter shall be construed in or of itself to ***alter in any manner the rights whatsoever of*** … ***any peoples*** or ***the terms of existing international instruments*** to which Members of the United Nations may respectively be parties.

1. The Palestine Mandate falls within the ambit of this provision. The Jews as a people are recognised and are granted specific rights under the Mandate; Britain, as the designated Mandatory, was a party to the Palestine Mandate – a recognised international instrument.[[91]](#footnote-91)
2. No Trusteeship Agreement between Britain and the Trusteeship Council has ever been concluded. Although the General Assembly, in passing Resolution 181 (II) purported to terminate the Mandate, it had no power to do so:
3. General Assembly Resolutions are recommendations and cannot be retreated as dispositive of territory where its sovereignty is disputed;
4. Such recommendation is contrary to an express provision of Article 80 of the UN Charter;
5. the Arab Block expressly rejected the Resolution and initiated an armed attack against the nascent State of Israel immediately following her Declaration of Independence, thereby frustrating the Palestinian population to establish an independent Palestinian state.
6. In any case, Article 80 would not support a claim for the protection of Palestinian rights in the West Bank for the following reasons:
7. Neither at the establishment of the Mandate nor in 1948, did the Palestinians constitute a ”***people***” entitled to claim the benefit of Article 80. Between 1948-1967 they claimed no separate peoplehood while under Jordanian jurisdiction. They were offered and accepted Jordanian citizenship. Only after 1967, when the West Bank came under Israeli jurisdiction did they begin to assert their ‘peoplehood’ claiming the right of ‘self-determination.
8. The only "people" referred to in the Mandate Instrument is the "Jewish People" and no other.
9. Although the Preamble to Mandate instrument does declare that in attaining the objective of the Mandate “the civil and religious rights of **non-Jewish communities** are “not to be prejudiced”, this provision applies neither to individuals claiming ‘refugee’ status, nor to any specific ethnic groups but to "***communities***"- meaning religious groups recognised earlier by the Ottomans as '*millets*’ who were permitted a certain degree of internal self- government in civil and religious matters. Such communities had no sovereign or nationalist political rights. [[92]](#footnote-92) This argument is supported by references in Article 9 of the Palestine Mandate in which

“respect for the personal status of the various peoples and ***communities*** and for their religious interests shall be fully guaranteed. In particular, the ***control and administration of Wakfs***shall be exercised in accordance with religious law and the dispositions of the founders.

1. In failing to consider, let alone refer to Article 80, the Court concentrated on examining the extent to which Arab Palestinian rights were allegedly being infringed, when it should have been looking at protecting Jewish rights.
2. The Jewish rights under the Palestine Mandate are set out in Articles 2, 6 and 7:  
     
   Article 2 provides:

“The Mandatory shall be responsible for placing the country under ***such political, administrative and economic conditions as will secure the establishment of the Jewish national home,*** as laid down in the preamble, and the development of self-governing institutions, and also for ***safeguarding the civil and religious rights of all the inhabitants of Palestine,*** irrespective of race and religion;

Article 6 provides:

***The Administration of Palestine***, while ensuring that the rights and position of other sections of the population are not prejudiced, ***shall facilitate Jewish immigration*** under suitable conditions ***and shall encourage***, in co-operation with the Jewish agency referred to in Article 4, ***close settlement by Jews on the land, including State lands and waste lands not required for public purposes;*** and

Article **7**declares:

“The Administration of Palestine shall be responsible for enacting a nationality law. There shall be included in this law provisions framed so as ***to facilitate the acquisition of Palestinian citizenship by Jews who take up their permanent residence in Palestine.***”

The ICJ in failing to make any reference whatsoever, to these aforesaid rights, misdirected itself it in its efforts to align its conclusion with the terms of reference presented to it by the General Assembly to declare Jewish settlement in the West Bank and the construction of the ‘Wall’as illegal.

1. The Mandate was not terminated in 1946 with the dissolution of the League of Nations in 1946. In 1951 and 1970 the ICJ expressly recognised the continuing effect of a Mandate and the obligations of the Mandatory thereunder.[[93]](#footnote-93) The fact that, Britain relieved herself of her obligations under the Palestine Mandate does not lead to the conclusion that the Jewish People have no rights in respect of such part of the territory as has been illegally appropriated by Jordan.
2. Theoretically, it can also be asserted that Britain illegally appropriated and alienated Trans-Jordan to the Hashemites in 1946, contrary Article 5 of the Mandate.[[94]](#footnote-94) Although by virtue of Article 25 of the Mandate Instrument Britain was authorised to “***postpone or withhold”*** application of such provisions of this mandate to the territory lying to the [East of the Jordan river] as [s]he may consider inapplicable to the existing local conditions,[[95]](#footnote-95) this did not entitle her to sever any part of the mandated territory. In fact such power was specifically denied her.[[96]](#footnote-96) It should be remembered that Britain’s authority in Palestine was as trustee and not that of a Sovereign[[97]](#footnote-97) and therefore she was not entitled to *alienate* any of the territory entrusted to her administration to a third party.
3. In paragraph 71 the Court refers to Britain’s declaration of her intention to relieve herself of her responsibilities as Mandatory in 1948,[[98]](#footnote-98) the passage of Resolution 181 (II) by the General Assembly recommending partition; and

“Israel proclaimed its independence on the strength of the General Assembly Resolution; armed conflict then broke out between Israel and a number of Arab States and the Plan of Partition was not implemented”

The Court then proceeds to refer to the terms of the 1949 Armistice Agreement between Israel and Jordan and immediately ends its pre 1967 historical review of the situation in paragraph 73 without providing the context

“In the 1967 armed conflict, Israeli forces occupied all the territories which constituted Palestine under the British Mandate (including those known as the West Bank, lying to the east of the Green Line).”

Following this review, the Court then finds that Israel’s status in the West Bank is that of a belligerent occupier who is required behave in accordance with the Hague Regulations and the 4th Geneva Convention.

It is submitted that the basis for the ICJ’s conclusion is both inaccurate and erroneous.

It is inaccurate in that:

* Israel’s Declaration of Independence was not reliant upon UNGA 181 as the Court stated, but upon its victory in a civil war which commenced with Britain’s abandonment of its mandatory responsibilities;
* Neither did armed conflict just “break out.” It was an armed attack by the surrounding Arab states directed at the nascent State of Israel, with the objective of annihilating her;
* No mention is made of Jordan’s status as a belligerent occupier of the West Bank between 1948 and 1967;
* The Court completely ignored in its reference to the 1949 Armistice Agreement that the Green Line was set “without prejudice to future territorial settlements”. The Court appears to assume that the Green Line constitutes a boundary between Jordan and Israel; that Israel took control of Jordanian territory as a belligerent occupier, disregarding that in the 1967 Six Days War, it was Jordan who was the aggressor.

In the Author’s view, the Count’s conclusions both as to Israel’s status in the West Bank as a belligerent occupier and the applicability of Article 49(6) of the 4th Geneva Convention prohibiting Jewish settlement in the West Bank are erroneous. Even if this view is unacceptable,

Article 80 of the UN Charter is still both relevant and valid in protecting the Jewish people’s right of immigration and land settlement in accordance with the Palestine Mandate Instrument, in respect of that part of the mandated territory which has not otherwise been legally appropriated. Sovereignty over this area is still in suspension until either Israel annexes it or she concedes all or part of her claim to a Palestinian entity.

\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*

APPENDIX

LEAGUE OF NATIONS MANDATE FOR GERMAN SOUTH-WEST AFRICA

THE COUNCIL OF THE LEAGUE OF NATIONS:

- ­*Whereas* by Article 119 of the Treaty of Peace with Germany signed at Versailles on June 28th. 1919, Germany renounced in favour of the Principal Allied and Associated Powers all her rights over her oversea possessions, in­cluding therein German South-West Africa; -and

*Whereas* the Principal Allied and Associated Powers agreed that, in accordance with Article 22. Part I (Covenant of the League of Nations) of the said Treaty, a Mandate should be conferred upon His Britannic Majesty -to be exercised on his behalf by the Government of the Union of South - Africa to administer the territory aforementioned. and have proposed that the Mandate should be formulated in the following terms; and

- *Whereas* His Britannic Majesty, for and on behalf of the Government of the Union of South Africa, has agreed to accept the Mandate in respect of the said territory and has undertaken to exercise it on behalf of the League of Nations in accordance with the following provisions; and .

*Whereas,* by the afore-mentioned Article 22, paragraph 8, it is provided that the degree of authority, control or administration to be exercised by the Mandatory not having been previously agreed upon by the Members of the League, shall be explicitly defined by the Council of the League of Nations:

**Confirming** the said Mandate, defines its terms as follows:-

ARTICLE I.

The territory over which a Mandate -is conferred upon His Britannic Majesty for and on behalf of the Government of the Union of South Africa (hereinafter called the Mandatory) comprises the territory which formerly constituted the German protectorate of South-West Africa.

ARTICLE 2.

The Mandatory ***shall have full power of administration and legislation over the territory - subject to the present Mandate as an integral portion of the Union of South Africa***, and may apply the laws of the Union of South Africa to the territory subject to such local modifications as circumstances may require.

***The Mandatory shall promote to the utmost the material and moral well-being and the social progress of the inhabitants of the territory sub­ject to the present Mandate***.

ARTICLE 3­

­The Mandatory shall see that the slave trade is prohibited, and that no forced labour is permitted. except for essential public works and services, and then only for adequate remuneration.

The Mandatory shall also see that the traffic in arms and ammunition is controlled in accordance with principles analogous to those laid. down in the Convention relating to the control of the arms traffic, signed on September l0th, 1919, or in any convention amending the same.   
The supply of intoxicating spirits and beverages to the natives shall be prohibited.  
ARTICLE 4­  
 The military training of the natives, otherwise than for purposes of internal police and the local defence of the territory, shall be prohibited. Furthermore, no military or naval bases shall be established or fortifications -erected in the territory.

ARTICLE 5.

Subject to the provisions of any local law for the maintenance of public -order and public morals, the Mandatory shall ensure in the territory free­dom of conscience and the free exercise of all forms of worship, and shall aI1ow aI1 missionaries, nationals of any State Member of the League of Nations, to enter into, travel and reside in the territory for the purpose of prosecuting their calling.

ARTICLE 6 ,

The Mandatory shall make to the Council of the League of Nations an annual report to the satisfaction of the Council, containing full information with regard to the territory , and indicating the measures taken to carry -out the obligations assumed under Articles 2, 3, 4 and 5.

ARTICLE 7.

The consent of the Council of the League of Nations is required for any modification of the terms of the present mandate.

The Mandatory agrees that, if any dispute whatever should arise be­tween the Mandatory and another Member of the League of Nations relating to the interpretation or the application of the provisions of the Mandate, such dispute, if it cannot be settled by negotiation, shall be submitted to the Permanent Court of International Justice provided for by Article 14 of the Covenant of the League of Nations.

The present Declaration shall be deposited in the archives of the League of Nations. Certified copies shall. be forwarded by the Secretary-General of the League of Nations to all Powers Signatories of the Treaty of Peace with Germany. . .

*Made at Geneva the* 17ih *day of* *December,* 1920

1. \* J.S.D. (Yale) Formerly Associate Professor, Faculty of Law, University of Western Ontario; Adjunct Professor, Technion, Israel Institute of Technology; of the Ontario and Israeli Bars and Solicitor, England & Wales [↑](#footnote-ref-1)
2. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory <http://www.icj-cij.org/docket/index.php?p1=3&p2=4&k=5a&case=131&code=mwp&p3=4> [↑](#footnote-ref-2)
3. Approximately only 5% of the TSB consists of a concrete wall. For 95% of its length the barrier consists of an a wire fence incorporating an electronic warning system in the event of its breach. See Advisory Opinion, paras 79-85 [↑](#footnote-ref-3)
4. Karin Calvo-Goller, *More Than a Huge Imbalance:The ICJ’s Advisory Opinion on the Legal Consequences of the Construction of the Barrier* 38 (2005) Isr. L. R.165-188; Eli E. Hertz, *Reply to the Advisory Opinion of July 9, 2004 in the Matter of the Legal Consequences of the Construction of a Wall in the Occupied Palestine Territory As Submitted to the International Court of Justice,* Myths and Facts, Inc New York, N.Y 2006. <http://www.mythsandfacts.org/ReplyOnlineEdition/toc.html> [↑](#footnote-ref-4)
5. Fr. Robert J. Araujo, *Implementation of the ICJ Advisory Opinion—Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory:Fences [Do Not] Make Good Neighbors?* 22 Boston U. Int. L.J 349 [↑](#footnote-ref-5)
6. Gerald Steinberg, *The UN, The ICJ and The Separation Barrier: War By Other Means*, 36 Isr. L.R. 331 [↑](#footnote-ref-6)
7. Gerald M. Adler, *Israel and Iraq: United Nations Double Standards- UN Charter Article 25 and Chapters VI and VII* <http://www.middle-east-info.org/gateway/unitednations/Israel%20and%20Iraq%20-%20UN%20Double%20Standards.pdf> [↑](#footnote-ref-7)
8. *ibid* [↑](#footnote-ref-8)
9. <http://www.publications.parliament.uk/pa/cm200304/cmselect/cmintdev/230/230we07.htm> . See also Gerald M. Adler "*Separation Barrier, Closures and Checkpoints in 'Occupied Palestinian Territories' and Postscript to the International Court of Justice Decision on the Barrier*  <http://www.ngo-monitor.org/article.php?id=1021> [↑](#footnote-ref-9)
10. <http://en.wikipedia.org/wiki/United_Nations_Special_Committee_on_Palestine> [↑](#footnote-ref-10)
11. <http://unispal.un.org/UNISPAL.NSF/0/07175DE9FA2DE563852568D3006E10F3> ; <http://en.wikipedia.org/wiki/United_Nations_Special_Committee_on_Palestine#Report_of_the_Special_Committee> [↑](#footnote-ref-11)
12. UNGA Resolution 181 <http://www.yale.edu/lawweb/avalon/un/res181.htm> [↑](#footnote-ref-12)
13. <http://avalon.law.yale.edu/20th_century/israel.asp> [↑](#footnote-ref-13)
14. Israel-Jordanian Armistice Agreement <http://avalon.law.yale.edu/20th_century/arm03.asp> [↑](#footnote-ref-14)
15. “Article IV: 1. The lines described in articles V and VI of this Agreement shall be designated as the Armistice Demarcation Lines and are delineated in pursuance of the purpose and intent of the resolution of the Security Council of 16 November 1948; . 2. The basic purpose of the Armistice Demarcation Lines is to delineate the lines beyond which the armed forces of the respective Parties shall not move. “ [↑](#footnote-ref-15)
16. Article II(2) “It is also recognized that no provision of this Agreement shall in any way prejudice the rights, claims and positions of either Party hereto in the ultimate peaceful settlement of the Palestine question, the provisions of this Agreement being dictated exclusively by military considerations.” [↑](#footnote-ref-16)
17. Michael B. Oren, ***Six Days of War, June 1967 and the Making of the Modern Middle East,*** Penguin Books, London, 2003 [↑](#footnote-ref-17)
18. <http://en.wikipedia.org/wiki/Khartoum_Resolution> ‘no peace with Israel, no recognition of Israel and no negotiations with Israel ‘ <http://www.jewishvirtuallibrary.org/jsource/Peace/three_noes.html> [↑](#footnote-ref-18)
19. <http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/240/94/IMG/NR024094.pdf?OpenElement> [↑](#footnote-ref-19)
20. Egypt’s War of Attrition 1969-70, <http://www.britannica.com/EBchecked/topic/1337698/War-of-Attrition> ; [↑](#footnote-ref-20)
21. Yom Kippur War, October 6-25, 1973, <http://en.wikipedia.org/wiki/Yom_Kippur_Warhttp://en.wikipedia.org/wiki/Yom_Kippur_War> [↑](#footnote-ref-21)
22. UNSC Resolution 338, October 2, 1973

    ” 2. *Calls upon* the parties concerned to start immediately after the cease-fire the implementation of [Security Council resolution 242 (1967)](http://unispal.un.org/unispal.nsf/5ba47a5c6cef541b802563e000493b8c/7d35e1f729df491c85256ee700686136?OpenDocument) in all of its parts;  
    3. *Decides* that, immediately and concurrently with the cease-fire, [negotiations](http://unispal.un.org/unispal.nsf/9a798adbf322aff38525617b006d88d7/124bb106b3da3f8285256f0a006a9a29?OpenDocument)shall start between the parties concerned under appropriate auspices aimed at establishing a just and durable peace in the Middle East.

    unispal.un.org/unispal.../7FB7C26FCBE80A31852560C50065F878 [↑](#footnote-ref-22)
23. Kenneth W. Stein, ***Heroic Diplomacy, Sadat, Kissinger, Carter, Begin and the Quest for Arab-Israeli Peacer,*** Routledge, New York, NY. 1999 [↑](#footnote-ref-23)
24. Israel –Egypt Peace Treaty <http://avalon.law.yale.edu/20th_century/isregypt.asp> [↑](#footnote-ref-24)
25. In mid-1992, Yossi Beilin, Israel’s deputy foreign minister, encouraged Israeli academics Yair Hirschfield and Ron Pundak secretly met Ahmed Queri,,Hassan Asfour and Maher al-Kurd, close associates of Yasser Arafat, Uri Savir, ***The Process, 1,100 Days That Changed the Middle*** ***East,*** Vintage Books, New York, 1998, p. 3 [↑](#footnote-ref-25)
26. *ibid*  [↑](#footnote-ref-26)
27. <http://avalon.law.yale.edu/20th_century/isrplo.asp> [↑](#footnote-ref-27)
28. <http://en.wikipedia.org/wiki/Israel_%E2%80%93_Palestine_Liberation_Organization_letters_of_recognition> [↑](#footnote-ref-28)
29. Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip <http://www.mfa.gov.il/MFA/Peace+Process/Guide+to+the+Peace+Process/The+Israeli-Palestinian+Interim+Agreement+-+Main+P.htm> [↑](#footnote-ref-29)
30. *ibid,*  consisting of An Agreement, 7 Annexes and 9 maps The topics included security arrangements, elections, civil affairs (transfer of powers), legal matters, economic relations, Israeli-Palestinian cooperation, and the release of Palestinian prisoners  
     See: Peter Malanczuk, ***Some Basic Aspects of the Agreements Between Israel and the PLO from the Perspective of International Law,***7 EJIL( 1996) 485-500 [↑](#footnote-ref-30)
31. Gaza-Jericho Agreement; the Agreement on Preparatory Transfer of Powers and Responsibilities signed at Erez on August 29,1994 and the Protocol on Further Transfer of Powers and Responsibilities signed at Cairo on August 27, 1995 [↑](#footnote-ref-31)
32. Annexes cover security arrangements, elections, civil affairs (transfer of powers), legal matters, economic relations, Israeli-Palestinian cooperation, and the release of Palestinian prisoners [↑](#footnote-ref-32)
33. Hebron is governed under a separate protocol. Gaza is no longer under any Israeli occupation, under Oslo II aerial and maritime jurisdiction reside with Israel and aerial and maritime access is subject to blockade. [↑](#footnote-ref-33)
34. <http://travel.state.gov/travel/cis_pa_tw/cis/cis_1064.html> [↑](#footnote-ref-34)
35. Jenin, August 2001. On March 27, 2001 a suicide bomber killed 30 mostly elderly vacationers and injured 140 more during Passover celebrations organised at a hotel in Netanya, following which Israeli military forces launched Operation Defensive Shield. Starting in Ramallah on 29 March 2002, the IDF put Yasser Arafat under siege in his compound and made incursions into Tulkarm and Qalqilya on 1 April , 2002, Bethlehem on 2 April 2002 and entered Jenin and Nablus the next day. <http://en.wikipedia.org/wiki/Operation_Defensive_Shield> [↑](#footnote-ref-35)
36. Settlements range in character from farming communities (Ezion Block ) and frontier villages to urban suburbs and neighbourhoods. The three largest settlements, Modi'in Illit, Maale Adumim and Betar Illit, have city status. [↑](#footnote-ref-36)
37. Declaration of Principles, Article V(3) <http://www.mfa.gov.il/mfa/peace%20process/guide%20to%20the%20peace%20process/declaration%20of%20principles> [↑](#footnote-ref-37)
38. See "Comment of the Government of Israel on the Report of the Sharm El-Sheikh Fact-finding Committee," 15 May 2001, p. 2; Barak's comments in Charles Enderlin, “***Shattered Dreams: The Failure of the Peace Process in the Middle East, 1995-2002*** “ New York: Other Press, 2003), pp. 302, 321-22; Shai Feldman, ***"The October Violence: An Interim Assessment," Strategic Assessment 3***, no. 3 (November 2000), <http://www.tau.ac.il/jcss/sa/v3n3p7.html> ; Gilead Sher (summary of remarks prepared by Liat Radcliffe); "***The Brink of Peace? An Inside Look from Camp David to Taba***," Peacewatch, no. 318 (18 April 2001), <http://www.washingtoninstitute.org/watch/Peacewatch/peacewatch2001/318.htm>; Eliot A. Cohen, "***It's a War. Now, to What End?"*** Washington Post, 21 April 2002; and Uzi Benziman, ***"Green light, red flag,"*** Ha'aretz, 27 October 2000 [↑](#footnote-ref-38)
39. The Al Aqsa Brigade located in the West Bank, is generally regarded as a terrorist group connected to Fatah, but whose relationship with that party is downplayed by most major news agencies. It has claimed responsibility for carrying out many of the suicide bombings by terrorists coming from the West Bank. Interrogation of senior members of Fatah – Marwan Barghouti, Nasser Awis, Nasser Abu Hamid and Ahmed Barghouti -by the Israel Security Agency (ISA) revealed that Yasser Arafat approved funding for Tanzim terrorists, in the knowledge that the money would be used for attacks against Israeli citizens. It also emerged that the PA weapon stores were being used for distribution of munitions to terrorists. [↑](#footnote-ref-39)
40. Jamie Weinstein ***Arafat's widow: 'Intifada' was premeditated*** , The Daily Caller Friday, December 28, 2012; [www.youtube.com/watch?v=r6I5fCCp4x4](http://www.youtube.com/watch?v=r6I5fCCp4x4) ; Memory TV #3689 - Suha Arafat, Widow of Yasser Arafat: The 2000 Intifada Was Premeditated, Planned by Arafat Dubai TV - December 16, 2012 - 01:17, <http://www.memritv.org/clip/en/3689.htm> ; “Immediately after the failure of the Camp David [negotiations], I met him in Paris upon his return.... Camp David had failed, and he said to me, ‘You should remain in Paris.’ I asked him why, and he said, ‘Because I am going to start an intifada. They want me to betray the Palestinian cause. They want me to give up on our principles, and I will not do so,’” … “I do not want Zahwa’s [Arafat’s daughter’s] friends in the future to say that Yasser Arafat abandoned the Palestinian cause and principles. I might be martyred, but I shall bequeath our historical heritage to Zahwa and to the children of Palestine,’” [↑](#footnote-ref-40)
41. HCJ 7015/02 Ajuri v. The Military Commander of the Judea and Samaria Area, 56(6) PD 352, 358

    <http://elyon1.court.gov.il/Files_ENG/02/150/070/A15/02070150.A15.pdf>

    HCJ 769/02 The Public Committee against Torture in Israel v. The Government of Israel. <http://elyon1.court.gov.il/files_eng/02/690/007/a34/02007690.a34.pdf> [↑](#footnote-ref-41)
42. Israel Ministry of Foreign Affairs, ***Operation Defensive Shield: Special Update March 29, 2002 - April 21, 2002*** <http://www.mfa.gov.il/MFA/MFAArchive/2000_2009/2002/3/Operation+Defensive+Shield.htm?DisplayMode=print>;; ***Al-Aksa Intifada: Operation "Defensive Shield***" <http://www.jewishvirtuallibrary.org/jsource/History/defensiveshield.html> [↑](#footnote-ref-42)
43. 30 Israeli military fatalities and 127 wounded: <http://en.wikipedia.org/wiki/Operation_Defensive_Shield#Casualties> [↑](#footnote-ref-43)
44. NGO Monitor, ***Operation Defensive Shield and the myth of the Jenin massacre*** ,

    <http://www.ngo-monitor.org/article/operation_defensive_shield_and_the_myth_of_the_jenin_massacre> ***“Jenin Jenin” – What Really Happened?*** <http://www.idfblog.com/2012/10/15/jenin-jenin-operation-defensive-shield/> [↑](#footnote-ref-44)
45. HCJ 769/02 The Public Committee against Torture in Israel v. The Government of Israel., <http://elyon1.court.gov.il/Files_ENG/02/690/007/A34/02007690.A34.pdf> [↑](#footnote-ref-45)
46. Protocol I to 4th Geneva Convention, Article 51(3), <http://www.icrc.org/ihl.nsf/WebART/470-750065> [↑](#footnote-ref-46)
47. *supra* note 44, paragraph 60. [↑](#footnote-ref-47)
48. Israel’s Security Fence, <http://www.securityfence.mod.gov.il/pages/eng/news.htm> ; In September 2005, Israel‘s Supreme Court in HCJ 7957/04 *Mara’abe v. The Prime Minister of Israel*, paras A1 described the fence situation as follows:

    “The separation fence discussed in the petition before us is part of phase A of fence construction. The separation fence discussed in The *Beit Sourik* Case is part of phase C of fence construction. The length of the entire fence, including all four phases, is approximately 763 km. According to information relayed to us, approximately 242 km of fence have already been erected, and are in operational use. 28 km of it are built as a wall (11%). Approximately 157 km are currently being built, 140 km of which are fence and approximately 17 km are wall (12%). The building of 364 km of the separation fence has not yet been commenced, of which 361 km are fence, and 3 km are wall.” <http://elyon1.court.gov.il/Files_ENG/04/570/079/A14/04079570.A14.pdf>

    see also <http://www.securityfence.mod.gov.il/Pages/ENG/default.htm> [↑](#footnote-ref-48)
49. <http://en.wikipedia.org/wiki/Israeli_West_Bank_barrier> ; see also the statistics present to the Israel Supreme Court: HCJ 2056/04 Beit Sourik Village Council v. The Government of Israel, paras 1-2 <http://elyon1.court.gov.il/Files_ENG/04/560/020/A28/04020560.A28.pdf>; ; *ibid* , Mara’abe . paras A1This case was decided after the rendering of the ICJ Advisory Opinion on the Wall and the Israel Supreme Court requested counsel for the State to respond to that Opinion. <http://www.icrc.org/ihl-nat.nsf/46707c419d6bdfa24125673e00508145/ff996dafb177f6ecc12575bc004899a5/$FILE/HCJ%207957.04.PDF> [↑](#footnote-ref-49)
50. <https://www.un.org/en/ga/sessions/emergency.shtml> <http://en.wikipedia.org/wiki/United_Nations_General_Assembly_Resolution_377> [↑](#footnote-ref-50)
51. UN Rules of Procedure, Rule 8

    (a) Special sessions of the General Assembly shall be convened within fifteen days of the receipt by the Secretary-General of a request for such a session from the Security Council or from a majority of the Members of the United Nations or of the concurrence of a majority of Members as provided in rule 9.

    (b) Emergency special sessions pursuant to General Assembly resolution 377 A (V) shall be convened within twenty-four hours of the receipt by the Secretary-General of a request for such a session from the Security Council, on the vote of any nine members thereof, or of a request from a majority of the Members of the United Nations expressed by vote in the Interim Committee or otherwise, or of the concurrence of a majority of Members as provided in rule 9. <http://www.un.org/en/ga/about/ropga/sessions.shtml> . See Andrew J. Carswell, ***Unblocking the Security Council The Uniting for Peace Resolution,***10 (2013) .JCSL 1 where the Author raises the inability of the Security Council to deal with the humanitarian crisis created by Syrian civil war. [↑](#footnote-ref-51)
52. *c.f.* UNSC Resolution 1402 passed March 30. 2002 and UNGA Resolution ES10/10 passed May 2, 2002.

    See Also UNGA Resolution ES10/18 which condemned Israel for its Cast Lead Operation while the Security Council was actively engaged in arranging a cease fire. S/RES/1860 (2009) [↑](#footnote-ref-52)
53. <http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/ES-10/2&Lang=E> [↑](#footnote-ref-53)
54. <http://unispal.un.org/UNISPAL.NSF/0/980C32A3B984695105256562006765F4> [↑](#footnote-ref-54)
55. This included extending an invitation to the PLO to participate in a conference of the High Contracting Parties to the 4th Geneva Convention to be convened by Switzerland during which it would be declared that the Convention would be applied to the Territories despite the opposition of Israel and the USA. [↑](#footnote-ref-55)
56. Resolution A/RES/ ES - 10/7 <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N00/710/92/PDF/N0071092.pdf?OpenElement> [↑](#footnote-ref-56)
57. <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N01/714/97/PDF/N0171497.pdf?OpenElement> ; <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N01/710/18/PDF/N0171018.pdf?OpenElement> [↑](#footnote-ref-57)
58. <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N02/377/00/PDF/N0237700.pdf?OpenElement> ; [↑](#footnote-ref-58)
59. <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N02/577/81/PDF/N0257781.pdf?OpenElement> [↑](#footnote-ref-59)
60. A/RES/E10/13 <http://unispal.un.org/UNISPAL.NSF/0/6DA605BD43667FE185256DCE00617927> [↑](#footnote-ref-60)
61. A/RES/ES10/12 <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N03/530/63/PDF/N0353063.pdf?OpenElement> [↑](#footnote-ref-61)
62. <http://www.icj-cij.org/docket/index.php?p1=3&p2=4&case=131&code=mwp&p3=4>; Official Court Summary <http://www.icj-cij.org/docket/files/131/1677.pdf> [↑](#footnote-ref-62)
63. <http://www.securityfence.mod.gov.il/pages/eng/route.htm> [↑](#footnote-ref-63)
64. Fr. Robert J. Araujo, S.J, ***Implementation of the ICJ Advisory Opinion—Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory: Fences [Do Not] Make Good Neighbors? 22 Boston***  U. ILJ 349; Michla Pomerance, ***The ICJ's Advisory Jurisdiction and the Crumbling Wall between the Political and the Judicial,*** 99 (2005) AJIL 26.; Ruth Wedgwood, ***The ICJ Advisory Opinion On The Israeli Security Fence and the Limits Of Self-Defense***, 99 (2005) AJIL 52; Pieter H.F. Bekkert, ***The World Court's Ruling Regarding*** ***Israel's West Bank Barrier and the*** ***Primacy of International Law:*** ***An Insider's Perspective,*** 38 (2005) Cornell Int'l L.J. 553; Emanuel Gross, ***Combating Terrorism: Does Self-Defense*** ***Include the Security Barrier? The*** ***Answer Depends on Who You Ask*** 38(2005) Cornell Int'l L.J. 569 2005; Daphne Barak-Erez,  ***Israel: The Security Barrier—Between International Law, Constitutional Law, and Domestic Judicial Review*** 4 (2006) Int’l J Con Law, 540 [↑](#footnote-ref-64)
65. HCJ 2056/04 Beit Sourik Village Council v. Government of Israel. <http://elyon1.court.gov.il/files_eng/04/560/020/A28/04020560.a28.htm>; HCJ 7957/04 Mara’abe vs. Prime Minister <http://elyon1.court.gov.il/Files_eng/04/570/079/A14/04079570.A14.htm> ‎ [↑](#footnote-ref-65)
66. HCJ 9593/04 Rashed Morar, Yanun Village Council et al v. IDF Commander in Judaea and Samaria *et al* <http://elyon1.court.gov.il/files_eng/04/930/095/n21/04095930.n21.htm> [↑](#footnote-ref-66)
67. The Author has found three commentators who have considered legality of the Fence within a longer-term political context. Iain Scobbie***, Unchart(er)ed Waters?: Consequences of the Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory for the Responsibility of the UN for Palestine*** 16 (2005) EJIL 941; Robert A. Caplen, ***Mending the “Fence”: How Treatment of the Israeli Palestinian Conflict by the International Court of Justice at the Hague has Redefined the Doctrine of Self-Defense***, 57 Florida L.R. 718; and Nicholas Rostow , ***Wall of Reason: Alan Dershowitz v. The International Court of Justice,*** 71 Albany L.R. 955 [↑](#footnote-ref-67)
68. Kathleen Ren´ee Cronin-Furman, *The International Court of Justice and the United Nations Security Council: Rethinking a Complicated Relationship* 106 Columbia L. R.435 [↑](#footnote-ref-68)
69. Sean D. Murphy**, *Self-Defense And The Israeli Wall Advisory Opinion: An Ipse Dixit From the IC?,*** 99 (2005) AJIL62

    Geoffrey R. Watson ***The "Wall" Decisions In Legal And Political Context,*** 99, (2005) AJIL 6. Robert A. Caplen, ***Mending the “Fence”: How Treatment of the Israeli Palestinian Conflict by the International Court of Justice at the Hague has Redefined the Doctrine of Self-Defense***, 57 Florida L.R. 718 [↑](#footnote-ref-69)
70. Article 2(4) reads “All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.” <http://www.un.org/en/documents/charter/chapter1.shtml> [↑](#footnote-ref-70)
71. “In the case of occupied territory, the application of the present Convention shall cease one year after the general close of military operations; however, the Occupying Power shall be bound, for the duration of the occupation, to the extent that such Power exercises the functions of government in such territory, by the provisions of the following Articles of the present Convention: 1 to 12, 27, 29 to 34, 47, 49, 51, 52, 53, 59, 61 to 77, 143.” <http://www.icrc.org/ihl.nsf/385ec082b509e76c41256739003e636d/6756482d86146898c125641e004aa3c5> [↑](#footnote-ref-71)
72. Article 64 provides: (1) The penal laws of the occupied territory shall remain in force, with the exception that they may be repealed or suspended by the Occupying Power in cases where they constitute a threat to its security or an obstacle to the application of the present Convention.

    (2) The Occupying Power may, however, ***subject the population of the occupied territory to provisions which are essential to enable the Occupying Power to fulfil its obligations under the present Convention***, to maintain the orderly government of the territory, and to ensure the security of the Occupying Power, of the members and property of the occupying forces or administration, and likewise of the establishments and lines of communication used by them. (Author’s emphasis) [↑](#footnote-ref-72)
73. Art. 43. “The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country. <http://avalon.law.yale.edu/20th_century/hague04.asp> [↑](#footnote-ref-73)
74. Geneva IV, Article 64(2) [↑](#footnote-ref-74)
75. Israeli-Palestinian Interim Agreement, Annex 1, Article I(6) and Article II(1)(a) <http://www.mfa.gov.il/MFA/ForeignPolicy/Peace/Guide/Pages/THE%20ISRAELI-PALESTINIAN%20INTERIM%20AGREEMENT%20-%20Annex%20I.aspx> [↑](#footnote-ref-75)
76. Kenneth Roberts, ***International Court of Justice and Its Powers of Judicial Review*** (1995) 7 Pace ILR 282, <http://digitalcommons.pace.edu/pilr/vol7/iss2/2> [↑](#footnote-ref-76)
77. Thomas M. Franck, ***The "Powers of Appreciation : Who Is The Ultimate Guardian of UN Legality?*** 86 AJIL 519 (Jul. 1992) <http://www.jstor.org/stable/2203965> While the Charter declares that the Court "shall be the principal judicial organ of the United Nations" and that each member of the Organization "undertakes to comply with the decision[s] . . . to which it is a party,,,it "is also significant,"as Professor Rosalyn Higgins has pointed out, "that at the San Francisco Conference the proposal to confer the point of preliminary determination [of each organ's competence] upon the International Court of Justice was rejected. The view was preferred that each organ would interpret its own competence.".  
    See also Nikolaos Lavranos***UN Sanctions and Judicial Review,*** 76 (2007)Nordic Journal of International Law, 1 [↑](#footnote-ref-77)
78. Gerald M. Steinberg, ***The UN, the ICJ and the Separation Barrier: War by Other Means***, 38 Is.L.R. 331; Michla Pomerance, ***The ICJ's Advisory Jurisdiction and the Crumbling Wall between the Political and the Judicial,*** 99 (2005) AJIL 26; Richard A. Falk, *Toward Authoritativeness: The ICJ Ruling on Israel's Security Wall* 99(2005)AJIL 42 [↑](#footnote-ref-78)
79. See Kathleen Ren´ee Cronin-Furman, The International Court of Justice and the United Nations Security Council: Rethinking a Complicated Relationship, 106 Col L.R.435 [↑](#footnote-ref-79)
80. <http://avalon.law.yale.edu/20th_century/leagcov.asp#art22> [↑](#footnote-ref-80)
81. <http://www.worldcourts.com/icj/eng/decisions/1950.07.11_status_of_SW_Africa.htm> [↑](#footnote-ref-81)
82. Ernst B. Haas, ***The Reconciliation of Conflicting Colonial Policy Aims: Acceptance of the League of Nations***

    ***Mandate,*** Vol. 6, (Nov., 1952), International Organization, 521 University of Wisconsin Press <http://www.jstor.org/stable/2704791> The Author provides an excellent analysis of the conflicting internal British policies and those of the Dominions, France and the USA [↑](#footnote-ref-82)
83. James C. Hales, ***Some Legal Aspects of The Mandate System: Sovereignty-Nationality-- Termination And Transfer.*** 23 (1937) Transactions of the Grotius Society, Vol. 23, Problems of Peace and War, 85 <http://www.jstor.org/stable/742945> [↑](#footnote-ref-83)
84. McNair, Arnold D “Mandates” (1928) 3.2 Cambridge L.J. 149, 155; Blum, Y.Z “The Missing Reversioner: ***Reflections of the Status of Judea and Samaria***” (1968) 3 Isr. L. Rev. 279, 282.; [↑](#footnote-ref-84)
85. ***French Mandate for Syria and the Lebanon,***  Supplement No. 3, Official Documents, vol. 17 (July 1923) AJIL 177-182: Article 1 “The Mandatory shall frame, within a period of three years from the coming into force of this mandate, an organic law for [Syria and the Lebanon][Mesopotamia]. This organic law ***shall be framed in agreement with the native authorities and shall take into account the rights, interests, and wishes of all the population inhabiting the said territory***. The Mandatory shall further enact measures to facilitate the progressive development of [Syria and the Lebanon][Mesopotamia] ***as independent state[s].*** …“ … <http://archive.org/details/draftmandatesfor00leagrich> [↑](#footnote-ref-85)
86. See Appendix ‘A’ for the full text of the South West Africa Mandate .   
    See alsoW. E. Rappard, ***The Practical Working of the Mandates System*** Vol. 4, No. 5 (Sep., 1925), J. British Inst. Int. Affairs, pp.205-226: http://www.jstor.org/stable/3014730 [↑](#footnote-ref-86)
87. *supra* note 61 at p.165 [↑](#footnote-ref-87)
88. Malcolm M. Lewis, ***Mandated Territories,*** 39 (1923) L. Q. Rev. 458, 465 [↑](#footnote-ref-88)
89. *ibid* p. 468 [↑](#footnote-ref-89)
90. See Appendix [↑](#footnote-ref-90)
91. Hales, *supra* note 82 [↑](#footnote-ref-91)
92. Abu Jaber, K. S.). ***The Millet System In The Nineteenth‐Century Ottoman Empire***. (1967) The Muslim World, 57(3), 212-223. [↑](#footnote-ref-92)
93. ICJ Advisory Opinion on International Status of South West Africa, 1950, General List No.10, 128 ; <http://www.icj-cij.org/docket/files/10/1891.pdf> ; ICJ Advisory Opinion on Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970) <http://www.icj-cij.org/docket/index.php?p1=3&p2=2&case=53&code=nam&p3=4> [↑](#footnote-ref-93)
94. Palestine Mandate Article 5:

    The Mandatory shall be responsible for seeing that no Palestine territory shall be ceded or leased to, or in any way placed under the control of, the Government of any foreign Power.” <http://unispal.un.org/UNISPAL.NSF/0/2FCA2C68106F11AB05256BCF007BF3CB#sthash.dRjyMBbB.dpuf> [↑](#footnote-ref-94)
95. Article 25 “In the territories lying between the Jordan and the eastern boundary of Palestine as ultimately determined, the Mandatory shall be entitled, with the consent of the Council of the League of Nations, to postpone or withhold application of such provision of this Mandate as he may consider inapplicable to the existing local conditions ...”

    Britain exercised this power in September 16, 1922, in a memorandum sent to the League of Nations and which the League subsequently approved. [↑](#footnote-ref-95)
96. *supra* note 93 [↑](#footnote-ref-96)
97. The Draft of the Mandate for Palestine as submitted by Lord Balfour on December 7, 1920, to the Secretariat-General of the League of Nations provided in Article 1.

    “His Britannic Majesty shall have the right to exercise as Mandatory ***all the powers inherent in the*** ***Government of a sovereign State***, save as they may be limited by the terms of the present Mandate.”

    This was not approved by the League of Nations and was replaced by the following text .

    “The Mandatory shall have full ***powers of legislation and of administration***, save as they may be limited by the terms of this mandate.” [↑](#footnote-ref-97)
98. The decision to allow the United Nations to determine Palestine's future was formalised by the Attlee government's public declaration in February 1947 that Britain's Mandate in Palestine had become "unworkable." [↑](#footnote-ref-98)